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No. 09-1496

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DELANO FARMS COMPANY, THE SUSAN NEILL COMPANY, AND LUCAS BROS. PARTNERSHIP,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether speech conveying a general message determined by a state legislature that is disseminated by a state agency subject to oversight by another state agency is government speech.

CORPORATE DISCLOSURE STATEMENT

As a governmental corporate party, the California Table Grape Commission is not required to file a corporate disclosure statement pursuant to Supreme Court Rule 29.6. In any event, the Commission has no parent corporation and has no outstanding stock held by any entity in any amount.

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IN THE

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No. 09-1496

DELANO FARMS COMPANY, THE SUSAN NEILL COMPANY, AND LUCAS BROS. PARTNERSHIP,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

This case does not merit the Court's review. Petitioners challenge the court of appeals' holding that speech of the California Table Grape Commission ("Commission") promoting grapes as directed by the California Legislature is "government speech." The court of appeals concluded that the speech of the Commission is "government speech" for two separate reasons: (1) the Commission itself is a government entity, and (2) the Commission's speech is "effectively controlled" by the California Department of Food and Agriculture ("CDFA") and the California Legislature. Pe-

titioners seek review of the court of appeals' decision, but they have repeatedly conceded that the Commission itself is a government entity, as the court of appeals correctly held. For this reason, petitioners challenge only the court of appeals' alternative "effective control" holding. Petitioners' failure to contest the first ground for the court of appeals' decision—the Commission's status as a government entity—is reason alone to deny the petition.

Even on its own terms, the petition fails to raise an issue warranting review. The court of appeals' alternative "effective control" holding is fully consistent with this Court's decision in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005). The Court in *Johanns* noted that the particular government-control mechanisms in place in that case were "*more* than adequate." *Id.* at 563 (emphasis added). And the Court had no reason to consider whether those mechanisms were constitutionally mandated. The court of appeals' "effective control" holding also does not conflict with decisions from any other courts of appeals. The cases petitioners cite arose in very different contexts and simply did not address the question presented here.

Finally, this case presents no questions of national importance. *Johanns* resolved the confusion surrounding the constitutionality of federal and state commodity programs, and the extensive litigation in this area is now largely finished. Moreover, the impact of the court of appeals' decision is cabined by, among other things, the singularity of the law establishing the Commission and therefore has limited applicability even within the Ninth Circuit. The question whether the particular statutory provisions that govern the California Table Grape Commission provide sufficient means for state oversight will have little, if any, effect beyond this case.

STATEMENT

1. In 1967, following a period of falling demand for California table grapes, the California Legislature enacted a statute (known as the "Ketchum Act") that created the Commission. *See* Cal. Food & Agric. Code § 65550. The purpose of the Commission is to expand demand for California table grapes worldwide and thereby strengthen the State's economy and improve the welfare and health of its citizens. *See id.* § 65500; *see also id.* § 63901.4. The Commission's work is funded primarily through small assessments imposed by the Ketchum Act on all shipments of California table grapes. *See id.* § 65600; Pet. App. C14 (Stipulated Facts ("SF")[1] ¶ 14).

The Commission was created as a public corporation, *see* Cal. Food & Agric. Code § 65551, and is considered a government agency under California law.[2] The Commission's governing board is composed of eighteen commissioners representing the six active growing districts in California and one "public member"—all of whom are appointed by the Secretary of

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[1] Before filing cross-motions for summary judgment, the parties stipulated to over 40 pages—and 170 paragraphs—of facts. These stipulated facts are set forth in the decision of the district court, which is reproduced in Appendix C to the petition.

[2] The California Legislature defines a "commission," such as the California Table Grape Commission, as a "state agency," Cal. Gov't Code § 11000, and numerous other state laws that apply to the Commission treat it as a state agency, *see id.* § 11121 (Bagley-Keene Open Meeting Act); *id.* §§ 6252(f), 6276.08 (Public Records Act); *id.* § 82049 (Political Reform Act of 1974); Cal. Civ. Proc. Code § 995.220 (posting bond); Pet. App. C66-68 (SF ¶¶ 160, 167).

the CDFA. *See* Cal. Food & Agric. Code §§ 65550, 65563, 65575.1; Pet. App. C14, C65-66 (SF ¶¶ 13, 156).

The Legislature authorized the Commission to engage in a variety of demand-generating activities including "promot[ing] the sale of fresh grapes by advertising and other similar means." Cal. Food & Agric. Code § 65572(h). The parties have stipulated that "the Commission has consistently followed that legislative directive." Pet. App. C29 (SF ¶ 51); *see also* Pet. App. C29 (SF ¶ 53).

The CDFA oversees the Commission and has broad authority to control its speech. The Secretary appoints and can remove all of the members of the Commission. Pet. App. C14, C65-66 (SF ¶¶ 13, 156). In addition, the Secretary is empowered, on the petition of an aggrieved party, to "reverse [an] action of the commission" if he finds that it was "not substantially sustained by the record, was an abuse of discretion, or illegal." Cal. Food & Agric. Code § 65650.5. The Ketchum Act also subjects the Commission to audit by the California Department of Finance and other authorized agencies. *See id.* § 65572(f).[3]

2. In 1996, petitioners filed this suit against the Commission. They asserted that the Ketchum Act violates their First Amendment rights by requiring them to fund speech by the Commission with which they allegedly disagree.[4] In September 1997, the district

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[3] In certain circumstances, moreover, the Secretary "cause[s] a referendum to be conducted among producers" to determine whether to suspend the Commission's operations. *Id.* § 65660.

[4] In fact, discovery revealed that petitioners actually have no disagreement with the substance of most of the Commission's work. *See, e.g.*, Supplemental Excerpts of Record 407 (Middleton

court applied this Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and dismissed almost all of petitioners' First Amendment claims. Following further proceedings, petitioners appealed. In 2003, the court of appeals applied this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), and reversed the district court's dismissal. *See* Pet. App. B8.

Following remand, the parties engaged in discovery and then filed cross-motions for summary judgment. In addition to raising other defenses not at issue here, the Commission relied on *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005).[5] In *Johanns*, this Court rejected a First Amendment challenge to the federal Beef Promotion and Research Act, which requires beef producers and importers to pay assessments to fund generic beef advertising. *See id.* at 554, 560-565. The Court first made clear that the compelled funding of government speech does not violate the First Amendment. *Id.* at 559. The Court then concluded that the advertisements run by the beef program are government speech.

The plaintiffs in *Johanns* had argued that the Beef Board's Operating Committee—which designs the ads

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Dep. 44:1-25) (statement by Delano Farm's President that the Commission is "a piece of socialism that doesn't work," that he does not "have any opinion on" the "substance of any of the commission's advertising," and that the "advertising and everything else" the Commission does is not his "main objection").

[5] The district court ruled for the Commission on some of these additional defenses. But because the court of appeals sustained the district court's decision on "government speech" grounds, it did not reach these alternative holdings.

at issue—is "a nongovernmental entity." 544 U.S. at 560. The Court noted that "only half of [the Operating Committee's] members are ... appointed by the Secretary" of Agriculture, but it did not reach the question whether the Committee is a governmental entity. Instead, the Court held that even if the Operating Committee is not itself a governmental entity, the speech of the program is nonetheless government speech because it is "effectively controlled" by the government. *Id.* at 560 & n.4, 562.

In concluding that the beef program is subject to sufficient government control, the Court observed that "Congress and the Secretary [of Agriculture] have set out the overarching message" of the program—promoting the image and desirability of beef—and have "left the development of the remaining details to an entity whose members are answerable to the Secretary" because they are subject to removal by him. 544 U.S. at 561. The Court also noted that the Secretary's oversight includes "final approval authority over every word used in every promotional campaign." *Id.* But the Court did not purport to mandate this level of oversight in every case. Indeed, the Court observed that the political safeguards in place in the beef program are "more than adequate" to demonstrate effective control by the government. *Id.* at 563.

On March 31, 2008, the district court granted summary judgment for the Commission. Pet. App. C213-C214; Pet. App. D1-D3. Applying *Johanns*, the district court held that the speech of the Commission is government speech because (1) the Commission itself is a governmental entity (Pet. App. C114-C124), and (2) the CDFA effectively controls the speech of the Commission (Pet. App. C124-C145). The district court entered

judgment for the Commission, and petitioners appealed.

3. On November 20, 2009, the court of appeals affirmed the judgment for the Commission. Like the district court, the court of appeals held that the speech of the Commission is government speech for two separate reasons:

First, in a portion of its decision joined by all three members of the panel (Judges Reinhardt and McKeown and Senior Judge Noonan), the court of appeals concluded that the speech of the Commission is government speech because the Commission itself is a government entity. Petitioners have not disputed that the Commission is a government entity. *See infra* pp. 10-11. Noting petitioners' "[o]ddly ... dismissive" treatment of the Commission's government-entity status (Pet. App. A9), the court of appeals explained that, under *Johanns*, "the governmental entity analysis remains a viable ground for determining exemption from the First Amendment" (Pet. App. A10). Because the Commission is itself a government entity, the court of appeals observed that this case presented "a cleaner statutory scheme" for applying the government-speech doctrine than the scheme in *Johanns*. *Id.*

After noting petitioners' concession that the Commission is a government entity, the court of appeals went on to confirm the Commission's governmental status in light of this Court's decision in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), and *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). Applying the test set forth in *Lebron*, the court of appeals found that the Commission is a government entity for First Amendment purposes because (1) the Commission was created by the California Legislature

as a corporation, (2) the Commission was established to further governmental objectives, and (3) the Secretary of the CDFA has the power to appoint all of the commissioners. Pet. App. A13-A14. The court of appeals thus "conclude[d] that the scale tips to classifying the Commission as a government entity." Pet. App. A9; *see also* Pet. App. A15.

Second, in an alternative holding joined by Senior Judge Noonan and Judge McKeown,[6] the court of appeals concluded that even if the Commission were not a government entity, the government-speech doctrine nevertheless would apply. *See* Pet. App. A15. The court held that the State of California has the legal authority to exercise "effective control" over the Commission's activities and therefore that "the Commission's message is 'from beginning to end' that of the State." Pet. App. A19 (quoting *Johanns*, 544 U.S. at 560).

In reaching this conclusion, the court of appeals found the Commission's "structure, and its relationship to the State of California ... strikingly similar" to the beef program upheld in *Johanns* and the pistachio program upheld in *Paramount Land Co.* v. *California Pistachio Commission*, 491 F.3d 1003 (9th Cir. 2007). Pet. App. A19. The court of appeals emphasized that, like the beef program and the Pistachio Commission, the Table Grape Commission "was established by an act of the Legislature, ... [which] provided an overriding di-

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[6] Judge Reinhardt did not join in the "effective control" portion of the court of appeals' decision because he "would simply [have] conclude[d] that the Commission is a government entity and that its speech is therefore government speech." Pet. App. A24-A25.

rective" regarding the Commission's message. Pet. App. A19-A20 (citing Cal. Food & Agric. Code §§ 63901(e), 65500). Indeed, the court of appeals concluded that the Ketchum Act provides more guidance than the statute governing the beef program. Pet. App. A20-A21 (citing Cal. Food & Agric. Code § 65500(a), (f)).

The court of appeals also determined that because the Secretary of the CDFA appoints and can remove *every* table grape commissioner, his power over the Commission is, in this respect, greater than the power of the United States Department of Agriculture ("USDA") over the beef program, where only half of Operating Committee members are indirectly appointed by the Secretary of Agriculture. Pet. App. A21. Additionally, the court of appeals noted the government's authority to audit the Commission (Pet. App. A21-A22) and the CDFA's authority to suspend the Commission's operations by causing a referendum to be conducted among producers (Pet. App. A23). The court of appeals had also earlier emphasized the Secretary's "power to reverse [an] action of the Commission" in a grievance proceeding brought by a grower. Pet. App. A4.

The court of appeals rejected petitioners' argument that the CDFA did not exercise sufficient control over the Commission because it did not engage in the same level of review present in *Johanns*. It held that the "differences in statutorily-prescribed oversight afforded to the government in the case of the Commission, the beef program, and the Pistachio Commission ... are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds." Pet. App. A24. It therefore declined petitioners' invitation to "'micro-manag[e] legislative and regulatory schemes,

a task federal courts are ill-equipped to undertake.'" *Id.* (quoting *Paramount*, 491 F.3d at 1012).

4. On January 5, 2010, the court of appeals declined to rehear this case *en banc*. The present petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

As explained below, the petition for a writ of certiorari should be denied.

I. PETITIONERS DO NOT CHALLENGE THE COURT OF APPEALS' CONCLUSION THAT THE COMMISSION IS A GOVERNMENT ENTITY

Review by this Court is not warranted because the parties and the court of appeals agree that the Commission is a government entity, and petitioners do not challenge this independent ground for the court of appeals' decision. As the court of appeals explained, *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005) provides two bases for classifying the Commission's activities as government speech: "(1) if the Commission is itself a government entity, or (2) if the Commission's message is 'effectively controlled' by the State." Pet. App. A8 (citing *Johanns*, 544 U.S. at 560-561). The court of appeals determined that the Commission satisfies both tests. *See id.*

Petitioners do not challenge the court of appeals' unremarkable conclusion that speech by a government entity is by definition government speech.[7] Nor do pe-

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[7] No case has ever suggested that for a government entity's speech to constitute government speech, it must be overseen by a separate government entity. No one would contend, for example, that the speech of the Federal Aviation Administration is not gov-

titioners dispute that the Commission is a government entity. Indeed, throughout the proceedings below, petitioners have repeatedly conceded that the Commission is governmental:

- "The Commission and the court below relied upon the weak fact that the Commission itself is a government entity. That's hardly little that matters when it comes to 'government speech.'" Pet. CA Br. 29.
- "The [Commission] is government by the Ketchum Act[.]" *Id.* at 7.
- "The Commission somehow claims that since the Commission was set-up as a government entity with the Commission members appointed by the Secretary, that not only does that make it a government entity, but whatever the Commission 'speaks' is 'government speech.'" Pet. CA Reply Br. 12.
- "Commission[s] are government entities as independent corporations." CA ER 525 (Plaintiffs' Separate Statement of Undisputed Facts ¶ 21) (internal quotation marks omitted).

The court of appeals noted petitioners' admission that the Commission is itself governmental. Pet. App. A9. But even apart from that concession, the court of

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ernment speech merely because no other government agency, such as the Department of Transportation, engages in prior review and approval of that speech. Likewise, this Court did not suggest in *Rosenberger* v. *Rectors & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), or *Board of Regents of University of Wisconsin System* v. *Southworth*, 529 U.S. 217, 229 (2000), that speech of a public university would not be government speech unless some other government agency exercised oversight over the university.

appeals correctly concluded that the Commission is a government entity for First Amendment purposes under *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). Pet. App. A13-A14.

Petitioners decline to challenge the government-entity basis for the court of appeals' conclusion that the speech of the Commission is government speech. Instead, petitioners present only one question to this Court: whether the speech of the Commission is government speech because it is "effectively controlled" by the California Legislature and the CDFA. Thus, nearly the entire petition is devoted to arguing that the court of appeals erred by finding sufficient control absent the precise level of review present in *Johanns*. But even if this argument were correct (which it is not), it would not call into question the court of appeals' separate holding that the speech of the Commission is government speech because the Commission is itself the government.

Petitioners attempt to address this fatal flaw in a single sentence. They assert—without further explanation--that the court of appeals' "effective control" analysis resolved both "the government entity question" and "whether such speech was government speech regardless of the nature of the Commission." Pet. 10. As an initial matter, this counterintuitive contention is wholly irrelevant in light of petitioners' concession that the Commission is a government entity. Because petitioners conceded this point, it does not matter whether or not the court of appeals' *Lebron* analysis depended on its "effective control" analysis. The *Lebron* analysis simply confirmed what petitioners had already admitted: the Commission itself is a government entity.

But, in any event, the text and reasoning of the court of appeals' decision belie petitioners' assertion. To be sure, the court of appeals indicated that it considered government "control" to be "closely related" to its government-entity analysis. *See* Pet. App. A15. Indeed, the court's two analyses considered some of the same factors: The appointment power and governmental objectives prongs of *Lebron*'s government-entity test (Pet. App. A13-A14) are also relevant to the effective control inquiry (Pet. App. A19-A21). But the court of appeals did not say that its government-entity analysis was dependent upon its "effective control" analysis—*i.e.*, that the Commission could be a government entity only if the *Johanns* "effective control" test is satisfied.

Rather, the court of appeals made clear that it was rejecting petitioners' challenge on *two separate* grounds. The court first resolved the government-entity analysis in the Commission's favor. *See* Pet. App. A15 ("Were we to decide this appeal based solely on whether the Commission is a government entity, *Lebron* and the strong indicia of governmental status and control would tip the balance to classifying the Commission as a governmental entity."). The court of appeals then alternatively held that, assuming the Commission is not a government entity, its speech is still government speech because of the State of California's "effective control" over the Commission's activities. Pet. App. A15-A24. The court of appeals thus concluded that "the Commission's activities are government speech, taking into consideration *both* avenues for classification of such speech." Pet. App. A8 (emphasis added). And it said that California's effective control "*also* render[ed]" the Commission's activities government speech. Pet. App. A15 (emphasis added).

Indeed, it would make no sense for the outcome of the government-entity analysis to depend on the "effective control" question. The "effective control" test was employed in *Johanns* to determine whether speech by an entity the Court assumed to be *non*governmental (the beef Operating Committee) could nonetheless be deemed government speech. *See* 544 U.S. at 560 & n.4.[8] It would be odd, to say the least, for that same test to dictate whether a supervised private entity is, in fact, governmental. Thus, this Court did not hold in *Johanns* that the Operating Committee is governmental because the "effective control" test was met. To the contrary, the Court declined to decide whether the Operating Committee is governmental. *See id.* at 560 n.4 ("We therefore need not label the Operating Committee as 'governmental' or 'nongovernmental.'").

Because petitioners concede that the Commission is governmental and therefore are unable to contest the primary basis for the court of appeals' decision, the petition should be denied.

II. The Court Of Appeals' Alternative "Effective Control" Holding Does Not Conflict With *Johanns* Or Decisions Of Other Courts Of Appeals

As explained above, certiorari is not warranted because petitioners do not challenge the court of appeals' independent government-entity holding. But even considered alone, petitioners' challenge to the court of ap-

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[8] *See also* 544 U.S. at 562 ("When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

peals' alternative "effective control" holding would not merit review. Contrary to petitioners' assertions, that holding does not conflict with either *Johanns* or decisions of any other court of appeals.

A. The Court Of Appeals' Alternative Holding Does Not Conflict With *Johanns*

The court of appeals' alternative holding—that the Secretary of the CDFA and the California Legislature effectively control the Commission's message—is fully consistent with this Court's decision in *Johanns*. Petitioners do not dispute that, as in *Johanns*, the California Legislature set the "overall message to be communicated," *Johanns*, 544 U.S. at 562, and defined the Commission's "duties" to promote grapes, Cal. Food & Agric. Code § 65572(h). As the court of appeals correctly determined, the Commission is also "answerable," *Johanns*, 544 U.S. at 561, to the California government in several key respects.

First, the Secretary of the CDFA appoints and can remove *all* the table grape commissioners. *See* Pet. App. A21. As a result, the Secretary necessarily retains control over the Commission's activities. *See Johanns*, 544 U.S. at 560-561 (members of the Beef Operating Committee "answerable" to the Secretary of Agriculture because they are "subject to removal by the Secretary" (emphasis omitted)).[9]

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[9] *See also Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary."); *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (recognizing that officer removable by Congress was "answerable" to, and

Petitioners discount the Secretary's appointment power because potential nominees are recommended by table grape producers in an election process. Pet. 16. But this process is not meaningfully different than the one in *Lebron*. *See* 513 U.S. at 397-398 ("the statute [creating Amtrak] restricts most of the President's choices [for appointment] to persons suggested by certain organizations or persons having certain qualifications"). Petitioners also question the court of appeals' reliance on the Secretary's removal authority. Pet. 16. But petitioners do not dispute that removal authority is an effective control mechanism. And they, in fact, *stipulated* that "[a]ll of the Commissioners ... are ... subject to removal by the Secretary." Pet. App. C65-C66 (SF ¶ 156).

Second, the Secretary of the CDFA is also empowered, on the petition of an aggrieved party, to "reverse [an] action of the commission." Pet. App. A4 (citing Cal. Food & Agric. Code § 65650.5); *see also* Pet. App. C66 (SF ¶ 159). Petitioners claim (Pet. 17) that this mechanism is inadequate because a third-party complaint is required. But petitioners—or any other California grower—could have pursued a grievance to challenge the Commission's advertising. Petitioners also point to the Commission's ability to challenge an adverse decision by the Secretary, but they fail to explain how judicial review to ensure that both the Commission and the CDFA comply with the law renders the Commission's message less governmental.

"control[led]" by, Congress and therefore could not be given executive functions); *Printz* v. *United States*, 521 U.S. 898, 922 (1997); *Morrison* v. *Olson*, 487 U.S. 654, 692 (1988).

Third, as the court of appeals recognized, the State's authority to audit the Commission provides yet another means of governmental control. Pet. App. A21-A22 (citing Cal. Food & Agric. Code § 65572(f)). Petitioners do not specifically question the efficacy of this oversight mechanism.

Petitioners contend that these control mechanisms are insufficient because the CDFA does not exercise the same degree of oversight as the USDA does for the beef program. *See* Pet. 13-15. But the court of appeals correctly found this difference "legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds" and appropriately cautioned that "'draw[ing] a line between these ... approaches to oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake.'" Pet. App. A24 (quoting *Paramount*, 491 F.3d at 1012) (ellipsis in original).

It is, of course, true that this Court in *Johanns* noted the extensive word-for-word review of the beef program by the USDA. But that does not mean that this precise form of oversight is an irreducible constitutional minimum. To the contrary, this Court in *Johanns* stated expressly that "the beef advertisements are subject to political safeguards *more than adequate* to set them apart from private messages." 544 U.S. at 563 (emphasis added); *see also Paramount*, 491 F.3d at 1011 (stating that *Johanns* "did not set a floor or define minimum requirements"). More fundamentally, the Court simply had no cause to address whether less intrusive USDA oversight would have been sufficient. It would have been improper for the Court to resolve that hypothetical question. *See Hali* v. *Beals*, 396 U.S. 45, 48 (1969) (courts should "avoid advisory opinions on abstract propositions of law").

Moreover, the court of appeals' holding finds support in cases decided by this Court before *Johanns* that were not called into question by *Johanns*. The government may compel citizens to fund its speech because it is ultimately accountable to the voters. As the Court stated in *Southworth*:

> When the government speaks ... to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235. This accountability exists whenever the government has the legal *authority* to control the relevant speech if it concludes that a program is departing from its prescribed message. If, for example, the Commission were to run offensive advertising, the Secretary of the CDFA and the Governor would be hard pressed to explain to Californians why they did not put a stop to it. Indeed, in other cases, this Court has attributed speech to the government for purposes of the First Amendment even where the government does not micromanage the dissemination of the speech.[10]

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[10] *See Rosenberger*, 515 U.S. at 833 ("When the government disburses public funds to private entities to convey a governmental message," it need only "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."); *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991) (upholding against First Amendment challenge program involving private doctors conveying family-planning information even though there was no indication that government reviewed and approved every word spoken by participating doctors); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (characterizing program in *Rust*

For all of these reasons, the court of appeals' alternative "effective control" holding is consistent with *Johanns*.

B. The Court Of Appeals' Alternative Holding Does Not Conflict With Decisions Of Other Courts Of Appeals

The court of appeals' "effective control" holding also does not conflict with decisions of any other court of appeals. Indeed, no other court of appeals has even addressed the question resolved in this case.

Petitioners initially rely on a two-paragraph remand order in *Pelts & Skins, LLC* v. *Landreneau*, 448 F.3d 743 (5th Cir. 2006). That summary order was issued following this Court's vacatur and remand of the Fifth Circuit's prior decision in light of *Johanns*. As petitioners themselves admit, the remand order "obviously did not resolve whether there was sufficient government control" over Louisiana's alligator marketing program. Pet. 19. Instead, the Fifth Circuit simply required "the district court to assess in the first instance the extent of governmental control of the speech at issue." *Pelts & Skins*, 448 F.3d at 744.

Forced to look further afield, petitioners cite a handful of cases arising outside of the agricultural promotion arena. But these cases are irrelevant. None addresses the question presented here: whether word-

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as involving government speech); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 298 n.6, 302, 310 (2000) (student invocations before football games were "government speech," not "private speech," for purposes of Establishment Clause even though student speaker was free to "decide what message and/or invocation to deliver").

for-word agency review is required where the Legislature has crafted a general message to be conveyed and authorized an entity answerable to the government to disseminate the message.

Petitioners first cite (Pet. 19-20) *Roach* v. *Stouffer*, 560 F.3d 860 (8th Cir. 2009). In that case, the court held that the State of Missouri's denial of a pro-life group's request for a "Choose Life" specialty license plate violated the First Amendment. *See id.* at 863-871. The court sensibly concluded that the hundreds of varied messages proposed by private groups for inclusion on specialty license plates that individuals can purchase constituted private speech. *See id.* at 863-868. Petitioners note that the court considered the degree of editorial control exercised by the State. Pet. 20. But the fact that the court considered editorial control in that very different context—where private groups proposed the general message—has no bearing on the court of appeals' decision here, which considered whether dissemination of a message *determined by the California Legislature* constituted government speech. Indeed, the court in *Roach* applied a distinct test developed before this Court's decision in *Johanns*. *See Roach*, 560 F.3d at 868 (asking whether a "reasonable and fully informed observer would recognize the [specialty plate] message ... as the message of a private party, not the state").

Similarly, the Ninth Circuit has recognized that specialty license plate cases and commodity promotion cases differ significantly. In *Arizona Life Coalition* v. *Stanton*, 515 F.3d 956 (9th Cir. 2008), the court relied on a pre-*Johanns* test to determine whether messages on specialty license plates are government speech, looking to *Johanns* merely for "support[]." *Id.* at 965. And in the decision at issue here, the court of appeals did

not even cite *Arizona Life Coalition*. As the court of appeals understood, far from creating a conflict, the specialty plate cases are so far removed from the present context that they simply have no bearing on it.

Petitioners also suggest (Pet. 21) that the Fourth Circuit's decision in *West Virginia Ass'n of Club Owners & Fraternal Services, Inc.* v. *Musgrave*, 553 F.3d 292 (4th Cir. 2009), conflicts with the court of appeals' decision here. In *Musgrave*, the court considered the constitutionality of a law restricting video lottery advertising by private retailers licensed to have video lottery terminals in their stores. *See id.* at 296-297. The court concluded that the speech at issue was "hybrid speech"—part private speech (because it involved privately funded speech by private parties) and part government speech (because the speech was part of the government lottery program). *See id.* at 298-300. But in doing so, the court did not even mention the effective control standard set forth in *Johanns*, let alone articulate an interpretation of that standard that conflicts with the court of appeals' decision here.

Petitioners attempt to relate *Musgrave* to this case by noting that the government conveyed "'its message through private speakers that it did not fund or provide with a means of communication.'" Pet. 21 (quoting *Musgrave*, 553 F.3d at 300). But here the State of California funds the Commission through compulsory assessments, Cal. Food & Agric. Code § 65604, and has provided its means of communication by statute, *id.* § 65500(f). The speakers in *Musgrave*, moreover, were private citizens whose speech was being restricted. The situation here is far different. California places no restrictions on the ability of table grape growers to run their own advertisements.

Finally, petitioners rely (Pet. 22) on *Page* v. *Lexington County School District One*, 531 F.3d 275 (4th Cir. 2008). In *Page*, the court held that a school district did not violate the First Amendment when it refused to let a county resident use the district's website and email to disseminate a message contrary to the district's position. *See id.* at 277-280. The district had used its website and email to distribute its own competing message, and, in doing so, had included material written by third parties and links to third-party content. *See id.* at 278. The question before the court was whether including those third-party materials created a limited public forum or whether all of the speech remained "government speech." *Id.* at 280.

In concluding that the speech at issue was government speech, the court explained that the school district "adopted and approved all speech, even that of third parties, as representative of its own position." 531 F.3d at 282. The court's focus on whether the district actually approved the speech made perfect sense given appellants' arguments that the district's use of links to external websites and content by third parties could not be government speech. The court's opinion, however, says nothing about the level of control required when a message originates with and is mandated by the state legislature—as is the case here.

III. This Case Does Not Raise Issues Of National Importance

Certiorari is also unwarranted because—contrary to petitioners' assertions—this case lacks national significance.

First, although extensive litigation regarding commodity promotion programs occupied the courts for

many years, *Johanns* largely resolved those disputes.[11] In any event, the incremental impact of the court of appeals' decision in this case would be limited by the structure of the Commission that the court considered. The Table Grape Commission differs from many other commodity promotion programs because the CDFA appoints all of its members. *See, e.g.*, *Paramount*, 491 F.3d at 1010 & n. 4 (Secretary of the CDFA appoints only one member of the California Pistachio Commission). The question whether the particular oversight

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[11] *See Paramount*, 491 F.3d at 1009-1012 (plaintiffs not likely to succeed on merits of First Amendment challenge to California Pistachio Commission in light of *Johanns*); *Pelts & Skins*, 448 F.3d at 743 (remanding for district court consideration of *Johanns* in the first instance); *Cochran* v. *Veneman*, No. 03-2522, 2005 WL 2755711, at *1 (3d Cir. Sept. 15, 2005) ("teachings of *Johanns* ... control the matters presented" in First Amendment challenge to federal milk promotion program); *American Honey Producers Ass'n* v. *USDA*, No. 05-1619, 2007 WL 1345467, at *9, 11 (E.D. Cal. May 8, 2007) (stating that "[t]here is no question that [*Johanns*] controls" and rejecting First Amendment challenge to federal honey promotion program); *In re Wilson*, No. 01-0001, 2005 WL 3436555, at *16-19 (USDA Nov. 28, 2005) (same); *Cricket Hosiery, Inc.* v. *United States*, 429 F. Supp. 2d 1338, 1343-1346 (Ct. Int'l Trade 2006) (rejecting First Amendment challenge to federal cotton program under *Johanns*); *Avocados Plus Inc.* v. *Johanns*, 421 F. Supp. 2d 45, 50-55 (D.D.C. 2006) (rejecting under *Johanns* facial compelled speech challenge to federal avocado promotion program); *In re Gerawan Farming, Inc.*, No. 02-0008, 2008 WL 2213514, at *6-8 (USDA May 9, 2008) (rejecting First Amendment challenge to federal nectarine and peach marketing orders in part under *Johanns*); *In re Red Hawk Farming & Cooling*, No. 01-0001, 2005 WL 3118142, at *8-13 (USDA Nov. 8, 2005) (rejecting under *Johanns* First Amendment challenge to federal watermelon program); *Gallo Cattle Co.* v. *Kawamura*, 72 Cal. Rptr. 3d 1, 5-12 (Ct. App. 2008) (applying *Johanns* and rejecting California Free Speech Clause challenge to California dairy promotion program).

mechanisms specified in the Ketchum Act provide the CDFA with the means necessary effectively to control the activities of the California Table Grape Commission is not an issue of broad or enduring consequence.

Second, petitioners argue (Pet. 24-25) that the court of appeals' decision will lead courts to immunize restrictions on—and laws compelling the funding of—political speech of private parties, including in the specialty license plate context. But, as discussed above, the court of appeals' holding is quite narrow. There is thus no reason to think the decision would permit private political speech to masquerade as government speech. Indeed, as noted above (*see supra* pp. 20-21), the Ninth Circuit has applied a distinct test to conclude that specialty license plates conveying political messages are private speech.

Third, petitioners contend that *Johanns*—both standing alone and as interpreted by the court of appeals—inadequately safeguards the First Amendment. This Court considered and rejected some of these same arguments when it decided *Johanns*. *See* 544 U.S. at 563 ("[T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages."); *id.* at 564 n.7 ("[R]espondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments[.]"). Petitioners' invitation to revisit *Johanns* should be declined. Moreover, because *Johanns* and the court of appeals' decision here require the legislature to have crafted the general message at issue, there is no risk that the government could immunize restrictions on private speech simply by imposing more of them. The inquiry in *Johanns* and here is whether the government is able to effectively control the dissemination of its *own* message.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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